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OCTOBER TERM, 1900.

Filed Oct. 23, 1900.

FRED. HEWITT, PLAINTIFF IN ERROR,
v.
EMIL SCHULTZ, ET AL. } *No.* 34.

J. M. MOORE, PLAINTIFF IN ERROR,
v.
D. B. STONE, ET AL. } *No.* 48.

J. M. MOORE, PLAINTIFF IN ERROR,
v.
JOHN CARMODE. } *No.* 49.

Additional Brief of Plaintiff in Error in No. 34, and of Defendant in Error in No. 48 and 49, in Answer to Supplemental and Reply Briefs Filed by Counsel Representing the Northern Pacific Railroad Company's Grantees Subsequent to the Call of these Cases for Argument.

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WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1900.

IN THE

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No. 34. FRED. HEWITT, PLAINTIFF IN ERROR,

v.

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v.

D. B. STONE ET AL.

No. 49. J. M. MOORE, PLAINTIFF IN ERROR,

v.

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Additional Brief of Plaintiff in Error in No. 34, and of Defendant in Error in No. 48 and No. 49, in answer to supplemental and reply briefs filed by counsel representing the Northern Pacific Railroad Company's grantees subsequent to the call of these cases for argument.

BRIEFS IN ALL CASES.

We submit, and the Court is requested to consider, the briefs and arguments for the settlers, and the opinions

and special proofs appearing in the records in cases No. 34, No. 47, No. 48, and No. 49, which were argued together as one case, as applying to all the cases alike. Effort has been made to avoid duplicating the arguments of one case in the others.

The Court is further requested to read the decisions of the Department of the Interior in—

Aug. 13, 1887. Atlantic & Pacific R.R. Co., 6 L. D., 85–93;
Aug. 2, 1888. N. P. R.R. Co. *v.* Miller, 7 L. D., 100–126;
(Covering 80 cases, none of which have been appealed or reviewed, while numberless cases have followed this decision in the 12 years past);
Sept. 3, 1891. N. P. R.R. Co. *v.* Walters, 13 L. D., 230–236;
June 2, 1892. N. P. R.R. Co. *v.* Pettit, 14 L. D., 591–592;
(Showing that St. Paul and Pacific R.R. Co. *v.* N. P. R.R. Co.—139 U. S. 1—is not authority, upon state of facts found in records herein, that selections are not necessary in indemnity limits);
July 7, 1893. Cole *v.* N. P. R.R. Co. 17 L. D., 8–19;
Oct. 14, 1893. LaBar *v.* N. P. R.R. Co. 17 L. D., 406–410;
July 25, 1894. N. P. R.R. Co. *v.* Davis, 19 L. D., 87–91;
Oct. 4, 1894. N. P. R.R. Co. *v.* Benz, 19 L. D., 229–231;
Dec. 20, 1897. N. P. R.R. Co. 25 L. D., 511–514;
April 29, 1898. N. P. R.R. Co. *v.* Streib, 26 L. D., 589–591;
Digest of Land Decisions, Dept. Interior (1897);
"Withdrawal," pp. 477–489;
"Indemnity," pp. 489–492;
"Selection," pp. 492–504;

not as authorities, but as full and exhaustive arguments, which we make our own, of the questions involved in all these cases; the reasons for the Department's uniform

rulings for the past 12 years, that, unless clearly wrong, should be decisive after thousands of vested rights have accrued to settlers thereunder.

THE BAR OF THE STATUTE OF LIMITATIONS.

Counsel have misapprehended our application of the statute of limitations of ten years. We were aware of the contention that the statute is suspended during contest in the Land Department, and this was particularly suggested in the oral argument, but it is without force. It is open for this Court to determine whether a contestant may hold up a pre-emption entry for 12 years by an ineffectual contest, and then, upon the facts appearing in these records, the same facts urged and *decided* in the contest, be aided by a court of equity to avoid the consequence of his own laches, the bar against a suit at law. The trouble is that the record, in the matter of title or right in the railroad company, blows hot and cold. Plaintiff wants to secure the benefits of the rights for which action is barred, so far as relates to relief, but for jurisdictional purpose, to avoid the bar by asserting these rights in an action also for entirely different relief that would be of little value unless it included that which he no longer has any legal right to demand. This can be done no more in equity than at law. In the complaint, at p. 8, Record No. 49, appears the following:

> "The plaintiff alleges that by virtue of the premises and *upon the definite location* of the line of said railroad, the said Northern Pacific Railroad Company became *the owner in fee simple* of the northeast quarter of section three, in township thirteen, north of range forty-two east, Willamette meridian, in Garfield county, in the then Territory (now State) of Washington." (The land in controversy.)

The material dates in this connection are :

Feb. 7, 1898, complaint filed (p. 14, Record No. 49).

Oct. 4, 1880, first definite location of line of road (p. 8, Record No. 49).

Oct. 4, 1880, withdrawal of lands in place and indemnity limits.

"Prior to 1885," final definite location (p. 7, Record No. 49).

(If the Act of July 2, 1864, does not prohibit withdrawal of indemnity lands, as we contend—at least it does not direct it, and authority for the executive withdrawal must be found elsewhere.)

Aug. 15, 1887, the executive withdrawal as to indemnity land was revoked by the same authority. (6 L. D. 92–93.)

No other withdrawal of indemnity lands has been made therefor, and the revocation having been within the power of the executive, whether because the withdrawal had been invalid or improvident, in contemplation of law, no withdrawal ever has been made. The right of the executive to revoke the withdrawal is unquestioned by any court and has uniformly been recognized by the Department.

In 1883, in Dakota, and

Jan. 5, 1884, in Washington, was the first alleged selection (p. 8, Record No. 49), in bulk, which we style an office listing without actual selection, and which was abandoned by the later selection of October 26, 1887, therefore a fatal gap in the railroad company's chain of title; but this never was approved, therefore void. (P. 2, Bunn & Kerr, Reply Brief.)

Oct. 26. 1887, in 48 and 49.

In 1892, in No. 34, the company made an alleged tract for tract selection that, also, never was approved. (P. 9, Record, No. 49.)

Apr. 10, 1882, settlement in No. 34.

Nov. 2, 1882, pre-emption filing.

Apr. 4, 1883, final proof.
June 22, 1895, patent issued.
In March or April, 1882, settlement in No. 48.
July, 1890, pre-emption filing.
May 2, 1898, patent issued.
Apr. 25, 1882, settlement in No. 49.
Jan. 5, 1884, pre-emption filing.
In 1897, patent issued.

(No patent or other record title was ever issued by the Government to the R.R. Co. which claims that the Act of July 2, 1864, granted fee simple title thereto, dating from definite location of 1884 or 1887—which?)

We must take the record as we find it; so, the complaint in 48 and 49 averring fee simple title, counting from the latest and most advantageous date for the R.R. Co., the statute interposes to bar suit, unless saved by the pendency of the Land Office contest.

Suit for possession, ordinarily ejectment, is an ample remedy when one party has title warranting possession and the other only adverse possession under none or some inferior title. Practically, whatever the legal fiction, suit for possession settles the dispute over title. One having the complete fee simple and equitable title must necessarily have right of possession superior to any other claimant. One having an adequate remedy at law may not resort to equity. That is this case, so far as the controversy over the land and between the parties. Something more might be necessary to obtain a construction, especially an overturning of the Guilford Miller decision. The R.R. Co., which neglected to bring that case, or the 80 other cases settled by it, into the courts within ten years after its promulgation, August 2, 1888, could well afford to lose these four cases on the merits if thereby the Miller precedent could be modified; but these four

settlers care nothing about ancient history; they only desire to save their own homes under the facts in their respective cases and the law applicable thereto.

Further along in the complaint, following the averment of selection, although even the words "*duly* selected," or their equivalent are omitted (and the ascertainment of a deficiency, and the due selection and approval within indemnity limits are absolute prerequisites to either title or claim by virtue of selection in lieu of deficiency), appears

> "That by reason of the facts *hereinbefore* set forth, the said Northern Pacific Railroad Company became the owner in fee and entitled to the immediate and exclusive *possession* of said lands and the whole and every part thereof, and was the owner of the complete equitable title therein and thereto." (P. 9, Record, No. 49.)

And the date fixed for the inception of this last above title was October 26, 1887 (same paragraph of complaint), ten years *and three months* prior to filing of suit.

Therefore, if *fee simple title* passed by and with the definite location of October 2, 1880, or "prior to 1885," or by the selection of October 26, 1887 (even were the later selection not of itself an abandonment of the earlier selection which did not pretend compliance with departmental requirements), the above averments at page 9, Record No. 49, dating plaintiff's right or claim herein only from October 26, 1887, must be taken as a formal abandonment of all earlier claim. The settler's rights and title accrued before the last named date.

Plaintiff cannot take advantage of his own wrong, and by his own act in instituting and prolonging the contest of the entry for twelve years, suspend the running of the statute. Whoever resorts to equity must have clean

hands and do equity. Whoever asks equity to enforce a legal right must (ordinarily) have exhausted all remedies at law. A man may not let the statute bar an action at law, and then, because of some additional strengthening of the title of the party in possession, say by the acquiring of a new title, at a day within the statute, do indirectly what he could not do directly, and try the old title or oust possession under it. This suit is for *possession* of the land, without which recovery would be valueless. It is a combined action at law and in equity permitted by the Washington code practice, and will be treated here as an equitable proceeding. As the R.R. Co.'s grantee has to-day no right or title not existing to the fullest extent on October 26, 1887, at latest, he had the same right of action then that he had February 7, 1898, when barred by the ten year statute unless the running of the statute was suspended by something not yet suggested in record or argument, *for nothing occurred between those dates.* Suit to vacate a patent could not be filed until after the issue of the patent, of course, and that argument would apply to a considerable portion of this controversy, the relief prayed for herein ; but this suit, stripped of all legal disguise is for *possession ;* and if plaintiff is entitled to possession now so he was entitled October 26, 1887, more than ten years before suit. Because this suit could affect rights within ten years, is no reason why it may go behind the statute and decide issues barred from consideration by any court, the vital issues, too, so far as the settler and his adversary claimant are concerned.

It is well settled that a homestead entry will support ejectment. This being so, necessarily a better title or right so superior that it would oust an entryman's possession would support some form of action for possession, as the form of action herein, which has been brought

upon the state of facts that existed prior to October 26, 1887. In these cases, the plaintiff asserts such superior right or title.

True, it is a little difficult to locate the precise prior right claimed or where our adversary finds it, but it is that or nothing. Unless he has such superior right his action fails upon the merits. If he has such right, action therefor was barred before suit. He declares that he had such right more than ten years before suit, and he must stand or fall by his declaration. No other judgment can be rendered upon the demurrer.

At page 3 of the reply brief, filed October 16, 1900, plaintiff quotes an isolated and an abstract extract from Marquez *v.* Frisbie (101 U. S., 473–5), as authority for

> "It follows, therefore, that the suits before the court could not have been commenced while the matters involved were still *in fieri*, before the Land Department, and that, therefore, the statute of limitations could not begin to run until title passed out of the United States."

The whole opinion, so far as applicable, seems to support just the opposite view.

This was an action brought by a pre-emption settler *in possession* against the railroad company and its grantee who had secured a decision, *not then final*, in their favor and against this settler, in the Land Department, "praying a decree of the court declaring him to be its true owner, and his right to the title paramount," and there was a prayer, as in the case at bar, that defendants should be declared to hold the land in trust for plaintiff, and be compelled to convey the same accordingly, etc., etc. The court, Mr. Justice Miller rendering the opinion, held that this must refer to the legal title (plaintiff, the settler, be-

ing in possession), which defendants had not, and which had not passed out of the United States, while the whole matter of such *title* was still undetermined before the land officers.

The court qualifies the quotation in our adversaries brief, by saying:

> "*We did not deny the right of the courts to deal with the* POSSESSION *of the land, prior to the issue of the patent, or to enforce contracts between the parties concerning the land.* But it is impossible thus to transfer *a title* which is yet in the United States."
>
> "If, however, we could suppose that defendants had obtained the patent which the Secretary has decided they are entitled to, that patent and the order on which it issued has in its favor all the presumptions which such an instrument necessarily carries, to which is to be added in this case the plaintiff's allegation that it was founded on a decision made after full contest and repeated hearings, by appeal and otherwise, by the officers to whom the law has specially confided the adjudication of that class of cases.
>
> "The rule which governs the courts in the effort to correct any error in such decision has been so repeatedly stated here as to leave no room for doubt or misconstruction.
>
> "That principal is that 'the decision of the officers of the Land Department, made within the scope of their authority, on questions of this kind, are in general conclusive everywhere, except where considered by way of appeal within that department; and that, as to the *facts* on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question."

Then follows the quotation at page 2 plaintiff's reply brief, which also is qualified by the succeeding paragraph of the opinion:

> "The language of this court in Moore *v.* Robbins cited above is that equity will interfere 'when it is *clear* that these officers have by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another.'
>
> "The meaning of this, and the sound principle, is that when it is a mixed question of law and of fact, and when the court cannot so separate them as to see *clearly* where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

No one can take the record, of which the Land Decisions and Reports must be considered part—for they are public records that courts will notice—and say that the first indemnity limits are insufficient to fully satisfy any deficiency either existing or ascertained to exist in place limits. Whatever may be the fact, it is certain that no one *knows* that they are insufficient, and the entire record which contains no averment that any deficiency has been *ascertained* seems to establish that the real deficiency is very small and not nearly the area of vacant and unappropriated lands in the indemnity limits. The R.R. Co. seems to fear an ascertainment of the exact deficiency, while the land department denies that any insufficiency has been ascertained or exists. Is this not a decidedly mixed question of law and fact?

In Marquez *v.* Frisbie, as in these cases, the sufficiency of the pleadings was attacked, and the court concluded:

> "We are hardly inclined to believe that if everything so stated is to be treated as absolute verity that it makes out his right. But it is sufficient to say that plaintiff also shows that all his proofs, together with 'those on the other side which he has *not* set out in his petition, were submitted to and passed upon by the land officers, from the register and re-

> ceiver up to the Secretary of the Interior, and they decided against the validity of his claim."

And the patent was sustained for want of such mistake of law or fraud as would "justify the interference of a court of equity."

Marquez *v.* Frisbie declares that the court had *not* decided that suit for *possession* could not be brought during the pendency of proceedings in the Land Department in such positive terms as to make it an authority for such suit, were authority wanting.

Encumbering the record with a multitude of allegations and prayers about matters pertaining to suits to quiet title, etc., cannot distract attention from the real issue.

In paragraph XIII, p. 8, Record No. 49—

> It is recited that the N. P. R.R. Co., "became the owner in fee simple of the lands."

In paragraph XIV, p. 9, Record No. 49, appears—

> "That the N. P. R.R. Co. became the owner in fee and entitled to the immediate and exclusive *possession* of said lands and the whole and every part thereof." Similar averments are in the other cases.

The conclusion of the prayer for relief (XXI, p. 13, Record No. 49) is—

> "That plaintiff be adjudged entitled to the immediate and exclusive *possession* of said premises and the whole and every part thereof, *and be put in possession thereof by order of this court.*"

That is the meat in this suit—"*possession*"—and however we may lay aside the matter of legal title, some one was entitled to possession from April, 1882, when the settlement was initiated. The Government was not entitled, and

has so decided in the contest of this entry, which according to Marquez *v.* Frisbie, is conclusive. No legal objection having existed to a suit by the railroad company, or its grantee, they are barred by the statute unless they sued in time. It cannot be denied that every one concerned knew of the settler's adverse, open, and notorious possession in ample time, for the contest record shows this, and the company's grantee bought with full notice of the pending contest and prior settlement and possession, therefore stands in the railroad company's shoes. The record forestalls every excuse that might be offered for delay in suing the settler.

There has not been the gap of one day since April, 1882, in which the settler has not been in possession of the lands in controversy in Nos. 48 and 49 (he was ousted in No. 34), through settlement, cultivation, occupation, formal entry, final proof and patent. It has been his *home* for 18 years. He held under title or color of title. His was "a claim or right." Whoever had any better right to possession, and to whom the courts were open, has lost his right to sue for such possession by intervention of the statute that, in the interest of repose, conveys title even to a trespasser.

Presumably, the railroad company, if it had rights, was in constructive possession before 1882, but if so (the record is silent) was ousted.

From whatever date the company's "right" is considered, such right has not been continuous. A gap has occurred during which the settler's right could have attached, *and did attach*, more than ten years before the filing of suit.

N. P. R.R. Co. *v.* Colburn, 164 U. S. 385;
St. Paul & Pac. R. Co. *v.* N. P. R. Co., 139 U. S. 1;
Deseret Salt Co. *v.* Tarpey, 14 : U. S. 241;
2 Ballinger's Code (Wash.), secs. 4797–4907.

SELECTION AND APPROVAL NECESSARY IN INDEMNITY LIMITS.

But the effort to avoid the statute of limitations has forced our adversaries to an admission of our uttermost contention respecting selection.

At page 2 of their reply brief, filed October 16, it is said:

> "The law was settled in the decision in Wisconsin Central Railroad Company *v.* Price County (133 U. S. 496), that *the title to indemnity lands does not pass until the approval of the selection by the Secretary of the Interior.* But it does not follow that a prior right cannot be initiated by selection which will be protected and enforced against one who receives a patent upon an entry subsequently initiated. This court enforced such a right in St. Paul and Sioux City R.R. Co. *v.* Winona and St. Peter R.R. Co. (112 U. S. 720), and St. Paul and Pacific R.R. Co. *v.* N. P. R.R. Co. 139 U. S. 1)."

That leaves in the cases only grantees' "prior right that might have been initiated by selection."

The full meaning of that expression is a little obscure, so long have we associated the "initiative" with the first move; the beginning; the start; the introductory step (see Standard Dictionary), but unless it means that a selection, like a homestead entry that relates back to the original settlement, may be referred to something in the case antedating the 1882 settlements, it is an abstract axiom. There is nothing in these cases of date earlier than the settlements except the grant, two or three general route locations, the first definite location of the line of road which was in lieu, therefore an abandonment, of the general route location, and itself abandoned by the *final* definite location, and the withdrawal that was afterwards revoked as from the beginning. All the homestead filings, with one exception, antedated selections.

Were the contention true that the alleged withdrawal had the effect to create a condition during which no valid pre-emption settlement in the indemnity limits could be made, nevertheless that would not better the railroad company's "right or title." The withdrawal keeps off unauthorized persons until the railroad company can *duly* select, but creates or declares no right or title in the company; while a withdrawal that has been revoked is a nullity.

It is clear that the grant creates rights only within the place limits, with an equitable promise to supply *ascertained* deficiencies out of the indemnity limits after their *approved* selection, in the meantime authorizing homestead settlements. Therefore,

(1). The granting act created no "prior right" in the indemnity lands.

(2). The withdrawal could not create such "prior right," and, having been revoked so that it was as if never made, it did not interfere with settlement.

(3). The selection was not made until after the settlement rights had been fully fixed, rights that ripened into patent, and was not approved even then; so, in law, there never has been a selection.

The rule in Wisconsin Central Railroad Company *v.* Price County (133 U. S. 496), is not, in terms, overruled or questioned in St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S. 1), a suit between two railroad companies to determine conflicting or overlapping grants, in which was involved no settlers' rights; and the case of the Northern Pacific Railroad Company *v.* Sanders (166 U. S. 620), follows the Wisconsin Central Railroad Company *v.* Price County case (*supra*), while U. S. *v.* Mo., Kan. & Tex. R.R. Co. (141 U. S. 376), fully discussed in 14 L. D. 591-2, de-

clares specifically that St. Paul and Pacific R.R. Co. *v.* N. P. R.R. Co. (*supra*), is an *exception* to the rule and inapplicable to the case at bar.

Failing to show any "prior right" by grant, withdrawal, or selection, which clearly and indisputably is this record, the admission above quoted is the end of the controversy. There has been no withdrawal or selection, and the grant does not execute itself in indemnity limits.

THE INTENDED AREA OF THE WHOLE GRANT, OR GRANTS.

A query arose during the argument respecting the length and breadth of the tract within which lands of the primary and first and second indemnity locations were to be found. This was stated by counsel for the settlers in round numbers as 2,000 miles long by 120 miles wide, while our adversaries were of opinion that 1,800 miles better expressed the length. The distance from St. Paul to Tacoma is 1,909 miles (World Almanac, 1900), but, according to Henry Clews Investment Guide (1899), the length of the Northern Pacific Railroad Company is—

Main line.....	2,346.98 miles.
Branch lines.....	2,033.20 miles.
Making a total of.....	4,349.98 miles

of road, for which were appropriated, excepting a short distance across Minnesota, if we are to be guided only by the Act of July 2, 1864, or the Resolution of May 31, 1870, the odd sections in a strip 60 miles on either side of the road, that is, 120 miles wide, if necessary, equivalent to a solid body of land over 4,000 miles long and 40 miles wide (say 114,000,000 acres), or an area nearly equal to the original thirteen colonies. Our adversaries claim a solid body of land, or its equiva-

lent, 40 miles wide along the line of the road for its entire length, whatever that may be, deducting the amount within organized states wherein the width is but 20 miles. Perhaps the generally understood area of the grant is not over half or one-third the above estimate; even then immense, but, computing only from the statute—and our adversaries "demand the strict letter of the bond"—these figures are substantially correct, and the exact area of either place or indemnity limits has not been *ascertained*. If a discrepancy of fifty or sixty million acres between the statute and the fact exists as to the entire grant, and of the difference between some three million acres deficiency as stated in the complaint herein and not over 4,011 acres as stated with equal positiveness by the Land Department, it is manifest that the company's long delay in locating and building the road should not be permitted to create a deficiency that must have been ascertained before it can have legal status anywhere, nor support a suit based upon such deficiency until the deficiency shall have been ascertained in the only manner provided by law. The complaint lacks this averment.

The Department of the Interior denies the deficiency, and this department is sole judge of the fact. Whatever may be the true extent of the grant, it was so boundless that nearly eleven million acres are claimed to have been lost from it through the entries of predatory settlers; and it is no wonder that Secretary Lamar should have said in 6 L. D. 91, that—

> "A monopoly for an indefinite period of a vast part of the public domain (was) not contemplated by the grant."

Or that Secretary Vilas should have followed this in 7 L. D. 122, with—

> "The aim of this language was, as I am forced to read it, toward the availibility of all lands not granted.
>
> "It was a vast grant, and even as so limited, a threatening shadow on the settlements of the Northwest. Well might Congress say, 'the lands granted you shall have, but you shall tie up no more from the actual settler to the prevention of development.'"

The expression in the "reply brief" following the suggestion that "no hardship would result to the entryman through the loss of these suits," because he could relinquish his home and "move on," to some wild land, probably in Canada, for none appears nearer, according to the complaint, and that "the act of July 1, 1898, is sufficiently broad to afford substantial relief," is a delicately veiled bit of irony. The railroad company has carefully provided against doing equity, for it has not to relinquish lands it has sold. This explains the apparently reckless purchases of these disputed homestead entries encumbered with law suits. Sales have been made in *each* of the four cases at bar. If sales have as prudently been made throughout all the grant, and this is a far-seeing corporation, "it is (*not*) manifest that the provisions of the act are such as to allow the vast majority of settlers to retain their land."

Six feet of ground will sometime offer permanent relief to such of us as may not previously have been cremated or drowned, but we don't see quite how that could be pleaded in satisfaction of a settler's home whose present value is beyond any dollar-and-cents measurement.

To the criticism that—

> "The suggestion of counsel that a decision by this Court affirming the validity of the withdrawal orders, would have the effect of dispossessing a large number of settlers is without foundation,"

we beg to recur to the sales of *each tract* of land involved herein. *Every* settler before this Court would be dispossessed; and these are test cases. It is fair to assume that the others "are like unto the first."

Our adversaries first brief, at page 50, closes with the assertion that a selection was unnecessary. Their third brief commences, at page 2, with the positive assertion that—

> "The law was settled by the decision of this Court in Wisconsin Railroad Company *v.* Price County (133 U. S. 496), that the title to indemnity lands does not pass until the *approval* of the selection by the Secretary of the Interior."

The argument of the statute of limitations has borne unexpected fruit.

The bulk selections of 1883 and 1884 were abandoned when the company filed the second selection covering the tract in question in 1887.

This question is dealt with and decided by the Secretary of the Interior in La Bar *v.* Northern Pacific, 17 L. D. 406. Here the Department was dealing with a settlement claim on an odd section within the indemnity limits of the Northern Pacific in the Fargo land district. In referring to the so-called second list of selections filed by the company on October 12, 1887, the Secretary declares that this latter list contains 7,900.78 acres less than the list of 1883, and the losses are correspondingly reduced. He then proceeds as follows:

> "In this connection I will state that an examination of the two lists shows that different losses are substituted in the second list, and like the first list,

the losses are not arranged tract for tract with the selected lands. The question arises, then, what is the effect of the filing of this second list upon claims attaching prior to the filing of the same? It is plain that it was intended as a substitute or amendment of the old list, and on account of its variance therefrom must be treated as an abandonment of the old list, for the company cannot stand on two lists specifying different losses as a basis therefor. It may be urged that such variance is but slight—that is, that the losses are the same with the exception of a few thousand acres, but, as neither list is arranged tract for tract, it cannot be said to which tract the variance applies. When La Bar settled on October 1, 1887, he settled subject only to the selection of 1883, which, having been abandoned, removes any bar against his settlement. A point of time must elapse between the substitution of the lists, and La Bar being a settler, his right attached upon the instant, and bars subsequent selection on account of the grant."

If the 1883 and 1884 selections were abandoned in 1887, then it must be held that between the filings in 1883 and 1884 and the date of abandonment, the selections had no power to reserve the lands from settlement claims. When the second selection (1887) was made, the withdrawal of the indemnity limits had already been cancelled. The withdrawal and the bulk selections of 1883 and 1884, being thus out of the way, the settlement claims, all of which were made previous to the second selection, attached to the various tracts, the settlers being on the ground and asserting their claims when the second so-called selection was made.

Were the losses in the granted limits so great that the odd-numbered sections in the indemnity limits were insufficient to supply them?

In cases No. 48 and 49, such allegation is attempted to be made in the bill of complaint, and in case No. 34, the record contains in the stipulated facts on page 38 what purports to be a certificate by Commissioner Lamoreux stating in substance that in the granted limits there would be a deficiency of 3,559,222.78 acres which could not be satisfied from the *first* indemnity limits.

It is upon this pretended certificate that counsel for defendant, in case No. 34, base their claim, set up in the last clause of their brief, that no selection in the indemnity limits was necessary—the odd-numbered sections therein being appropriated to the R.R. Co., without such selection. To show that the certificate of the Commissioner found in the record of 34, is unreliable and of no importance, we call the attention of the court to Senate Document No. 150, 54th Congress, Second Session, in which the Commissioner of the Land Office reports the deficiency in the entire grant at 559,889.99 acres. And in N. P. R.R. Co., 25 L. D. 511, the Secretary declares that on November 5, 1897, the Commissioner reported the approximate deficiency in the entire grant at 530,573 acres. The so-called certificate of Commissioner Lamoreux is dated October 5, 1896. It elsewhere appears as May 2, 1896. The report to the Senate found in Document No. 150, was made Feb. 23, 1897. It thus appears that the Commissioner of the G. L. O. was making *guesses* only, but which had the semblance of being in good faith, as the deficiency was given to the fraction of an acre.

To show that these foregoing statements were the result of computation without any sufficient basis, it is enough to say that a large proportion of the lands lying within the granted limits have never yet been surveyed, and the same is true of a large proportion of the lands

within the indemnity limits. Hence there was no basis for stating the losses in the primary limits, nor the amount of land available for indemnity in the outer limits. This fact, that the surveys had not then and have not now been completed, is within the knowledge of the court, and was stated by counsel for the R.R. Co., in response to an inquiry from one of the justices during the oral argument.

On page 5 of the report of the Secretary of the Interior for the fiscal year ending June 30, 1899, the Secretary calls attention to the late report of the Commissioner of the General Land Office with regard to this Northern Pacific, grant, and states that such report "purports to give definite statements with respect to the status of the grant to the Northern Pacific, but the Commissioner's attention being called to many unsettled and litigated questions, in advance of the settlement and adjudication of which no definite statement of the status of the grant is possible, he has submitted a supplemental report which concludes as follows:

> "In conclusion, I have the honor to state that the portion of my report which relates to this subject was written for the purpose of giving information to the Department relative to the character and quantity of the work performed and the results accomplished during the fiscal year, and without any intention of making an authoritative statement as to whether or not the Northern Pacific grant by the Act of 1864 could be satisfied.
>
> "In view of the large quantities of unsurveyed lands within the grant, and of the uncertainty of their availability for use in the satisfaction of it; of the litigation pending involving lands within the conflicting limits aforesaid and the true eastern terminus of the grant, and considering the proceedings now in progress under the Act of July 1, 1898, and the right of selection for lands within the Mount Rainier forest

reserve under the Act of March 2, 1899, and the prospect of the creation of other forest reserves within the limits of the grant, *I am of opinion that it cannot at this time be stated with any degree of certainty that there are or are not sufficient lands available to satisfy the Northern Pacific grant under the act of* 1864."

In addition to all this, the Secretary found in N. P. R.R. Co., 25 L. D. 511 *et seq.* (*supra*), and in N. P. *v.* Streib, 26 L. D. 589, that there has never been any ascertained deficiency in the grant to the Northern Pacific showing that it could not be satisfied by obtaining the available lands in the indemnity limits. In 25 L. D. just cited, the Secretary sets out the conflicting statements made by the Commissioner concerning the matter of deficiency, and declines to make a decision to the effect that a deficiency has been established. And in 26 L. D. the Secretary says: "Relative to the certification of a deficiency in the grant to this company (the Northern Pacific) made by your predecessor, it is sufficient to say that this Department has never given recognition to that certificate, nor has the Company been relieved from the specification of losses in making indemnity selections on account of an ascertained deficiency in the grant."

SUMMARY.

The questions raised by the supplemental briefs filed by the R.R. Co., on behalf of its grantees in these various cases, may be stated as follows:

First. If the withdrawal of the indemnity limits was illegal, then the rights of the plaintiff in 34, and the defendants in 48 and 49, attached to the various tracts upon settlement, and were properly ripened into patents.

Second. If the so-called bulk selections of 1883 and

1884 were not such a compliance with the law and regulations as to selections, as to appropriate the lands for the benefit of the R.R. Co., and reserve them from settlement rights, then, and in that event, as soon as the withdrawal was revoked (Aug. 15, 1887) the settlers being upon the tracts improving them and claiming them in good faith, their rights immediately attached. All these settlers were on the lands *before* the 1883 and 1884 selections.

Third. If the withdrawal of 1873 should be held sufficient to bar the inception of settlement rights during its pendency, and if the so-called selection of 1883 was sufficient to reserve the lands from settlement claims after the withdrawal had been revoked, yet if the filing of the so-called selection in 1887 was, on the part of the R.R. Co., an abandonment of the previous selection, then, and in that event, the settlement claims were properly patented, as all the settlers were on their respective tracts previous to the said second selection.

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GEO. H. PATRICK,
Of Counsel for Defendants in Error in Nos. 48 *and* 49.